Statement of Peter Kochenburger in Support of H.B. 5449

I support H.B. 5449 as I believe it is necessary to help preserve an essential promise of Connecticut's Workers Compensation Act: that benefits will be paid swiftly and disputes fairly resolved. As background, I teach insurance law at UConn Law School; here, however, I am speaking solely in my private capacity and these opinions are mine alone.[1]

Workers' compensation systems date back to the early 20th Century and are in place in every state. It is a no-fault system with compensation based on the existence of a work-related injury or illness, rather than on concepts of fault and negligence. Indemnity – wage – benefits are capped and other damages limited or unavailable altogether. In exchange, the injured worker is promised prompt payment of medical and indemnity benefits and an administrative structure that will swiftly resolve disputes. From its inception in 1913, the Connecticut Legislature and the courts have recognized the necessary correlation between limited benefits and the certainty and promptness of receiving them:

> The certainty of the receipt of compensation for injury follows the act. Its procedure contemplates a speedy investigation and hearing by a commissioner without the formalities of a court and without, as a general rule, the employment of an attorney. It attempts to improve the condition of the workman under modern methods of industry by giving him partial recompense for an injury, with a result more certain and speedy and less expensive than under the former method in tort litigation. *Appeal of Hotel Bond Company*, 89 Conn. 143 (1915).

Over the years, Connecticut, like most other states, has reduced the indemnity benefits available in an effort to lower the cost of workers' compensation insurance. While these changes are certainly within the Legislature's power, they heighten the need for improvement on the flip side of the bargain, the delivery of benefits.[2]

Workers' compensation insurers typically determine whether a claim is covered within the Act, the extent of temporary and permanent disability, and review medical treatment (subject to the WCC). Injured workers, like all insurance policyholders or claimants, are especially vulnerable when making a claim, because unlike other products and services, there is no substitute possible if the "product fails" - meaning the insurer does not adjust the claim appropriately. The policyholder cannot go out and find a different insurer, or another insurance policy, to cover the claim. This concern is heightened in the workers' compensation context, because the injured worker and her family often rely on these benefits as their primary source of support. As testimony on this bill describes, injured workers are too often stuck in administrative and judicial procedures where they are both the least-informed party (compared to the insurer) and the one

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[2] These problems are not unique to Connecticut. National Public Radio has explored problems nationwide with workers compensation systems in an in-depth series of reports: http://www.npr.org/series/394891172/insult-to-injury-americas-vanishing-worker-protections.

who can least afford a negative and incorrect determination.[3] This bill will help address these situations.

H.B. 5449 provides an additional tool and remedy for injured workers if the workers' compensation insurer acts unreasonably. Enhanced penalties for an insurer's breach of the duty of good faith and fair dealing are recognized in virtually every state, and in Connecticut, the Unfair Trade Practices Act and the Unfair Insurance Practices Act have been in place for decades. Accordingly, the proposed remedies in H.B. 5449 are not new, but would simply apply existing consumer protections to another group of insurance consumers – injured workers. These laws protect policyholders and (sometimes) claimants who have property and liability claims in many situations where the consequences of insurer delay and denial varies significantly. I believe it is good public policy to extend these same protections to injured workers, who are in particularly vulnerable circumstances.

H.B. 5449's provision allowing injured workers to recoup their attorneys' fees when an insurer is found in violation is particularly important. As in many consumer cases, the amount in controversy, however important to the injured worker and her family, is often insufficient to make it economically feasible to hire an attorney, even though the administrative proceedings are often complex and if not utilized correctly, can eliminate the workers' ability to succeed in an appeal to Superior Court. Connecticut statutes often include similar provisions allowing the plaintiff/consumer to recoup attorneys' fees if successful, and they are common nationwide and at the federal level in areas such as consumer protection, civil rights, and environment. Three important public policy reasons for statutorily authorizing the plaintiff to recoup attorney's fees are also present in the workers' compensation context: (1) the amount in controversy is often too low in regards to the potential legal costs, (2) the rights protected are important elements of public policy (encouraging reasonable insurer behavior), and (3) private enforcement is a necessary or useful adjunct to regulatory authority.

Finally, I urge the Legislature to strike the final sentence in the Bill that would allow the court to award up to $5,000 in attorney's fees to the *insurer* if the claimant "does not prevail." Reversing the "American Rule" where each side pays their own attorney's fees is a tool employed to help enforce important public rights and should not contain a penalty that could be devastating to the plaintiff if she does not "prevail." This provision will likely inhibit some consumers from filing meritorious (even if ultimately unsuccessful) claims and would diminish the important purposes behind this legislation and the Workers Compensation Act generally.

Thank you for considering my testimony.

Peter Kochenburger, March 2, 2016

[3] I am not criticizing or downplaying the important role played by the Workers Compensation Commission nor their dedicated staff; however its powers are necessarily limited by statute and its workload and ability to adjudicate disputes stressed.